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Supreme Court, U.S.
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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1980

CLARENCE DAVID McNEIL,

Petitioner,

v.

STATE OF NORTH CAROLINA,

Respondent.

* *

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF NORTH CAROLINA
AND
THE COURT OF APPEALS OF NORTH CAROLINA

* *

PETITION FOR WRIT OF CERTIORARI

* *

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QUESTIONS PRESENTED

I. Whether Petitioner was denied due process of law by being compelled to display himself to the jury while the State's witness identified him for the first time and pointed to alleged distinguishing characteristics upon his person, when there were no peculiar exigencies requiring it; where the State failed to demonstrate that no alternatives to such procedure existed; and where such a procedure before the jury was inherently suggestive?

II. Whether the trial court's failure to charge the jury that they must find Petitioner guilty beyond a reasonable doubt of an essential element of each of the charged offenses denied Petitioner due process of law by alleviating the State of its constitutional burden of proving the guilt of Petitioner beyond a reasonable doubt, and, in effect, shifting to Petitioner the burden of negating an essential element in each of the two offenses?

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October Term 1980

CLARENCE DAVID McNEIL,
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v.

STATE OF NORTH CAROLINA,
Respondent.

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PETITION FOR WRIT OF CERTIORARI

* *

Clarence David McNeil respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Court of Appeals of North Carolina, and the judgment of the Supreme Court of North Carolina in this proceeding.

OPINIONS BELOW.

The written opinion of the Court of Appeals of North Carolina is reported at 47 N.C. App. 30, 266 S.E. 824 (1980), and is reproduced as appendix A.

The judgment of the Supreme Court of North Carolina is reported at N.C. , S.E.2d (1980), and is reproduced as appendix B.

JURISDICTION.

The opinion of the Court of Appeals of North Carolina was filed on June 3, 1980. Following that, within the time allowed by the North Carolina rules of Appellate procedure, the Petitioner appealed from that opinion, raising the same federal consti-

tutional questions as are raised in this Petition for Writ of Certiorari, to the Supreme Court of North Carolina. By order entered September 24, 1980, the Supreme Court of North Carolina dismissed the appeal and also denied a Petition for Discretionary Review. This Court's jurisdiction is invoked under 28 U.S.C. §1257 (3) and 28 U.S.C. §2101 (d).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

The Constitution of the United States:

AMENDMENT XIV.

> Section 1. . . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 90-95 (a) (1) of the General Statutes of North Carolina, (Replacement 1975) provides:

> (a) Except as authorized by this Article, it is unlawful for any person:
>
> (1) To manufacture, sell or deliver, or possess with intent to manufacture, sell or deliver, a controlled substance;

Section 90-113.1 of the General Statutes of North Carolina (Replacement 1975) provides in pertinent part:

> Burden of proof; liabities. -- (a) It shall not be necessary for the State to negate any exemption or exception set forth in this Article in any complaint, information, indictment, or other pleading or in any trial, hearing, or other proceeding under this Article, and the burden of proof of any such exemption

> or exception shall be upon the person claiming its benefit.
>
> (b) In the absence of proof that a person is the duly authorized holder of an appropriate registration or order form issued under this Article, he shall be presumed not to be the holder of such registration or form, and the burden of proof shall be upon him to rebut such presumption.

STATEMENT OF THE CASE.

The Petitioner, Clarence David McNeil, was charged in Wake County, North Carolina, in separate bills of indictment with unlawful sale and delivery of the Schedule II controlled substance Phenmetrazine (Preludin), and with the unlawful possession of that same substance with the intent to sell and deliver. Both indictments arose out of the same transaction, and involved the alleged exchange of a single Preludin pill for three packages of meat with a Raleigh, North Carolina, police officer working in an undercover capacity.

Petitioner McNeil pleaded not guilty, and stood trial before a jury in the Wake County, North Carolina, Superior Court. He was convicted by the jury, and received an active prison sentence, which has been stayed throughout his direct appeals to the North Carolina Court of Appeals and the North Carolina Supreme Court. The judgment imposing an active prison sentence on each indictment, to run concurrently, remains stayed.

Identity of the Petitioner Clarence David McNeil as the person who exchanged the Preludin pill for the meat was a central issue before the jury in this case. The undercover officer, Mr. Jordan, testified at the trial that the alleged exchange took place on Janaury 26, 1979, while the officer was in Petitioner's presence for three to five minutes. (State record, p. 12.) In addition, Officer Jordan testified that Petitioner had an almost identical twin brother, named Cepheus McNeil. Officer Jordan further testified that he did

not know either of the twins personally, but he had been "forewarned" that one could supposedly tell the two twins apart by a small dent or scar over Petitioner's left eye, which the other twin did not have. (State record, p. 12)

At this point in the trial, the State moved that the Court order Petitioner to exhibit himself to the jury, and "more particularly the dent that has been referred to by the officer." After a bench discussion off the record, the trial court allowed the motion, over the Defendant's on-the-record objection. (State record p. 13.) After ordering Petitioner to stand at various ends of the jury box, so all jurors would have an opportunity to observe Petitioner at close range, and over objection of Petitioner's trial counsel, the trial court also permitted Officer Jordan to point out to the jury the scar on Petitioner's forehead over his left eye. (State record p. 13.)

On cross examination, Officer Jordan conceded that when he went to the premises where the Preludin was allegedly exchanged for the meat, he knew that there were two twin brothers at the premises; he knew both of their names; but he did not know which was which. (State record, p. 17.) The Officer testified that a detective, not called by the State at Petitioner's trial was the source from whom he learned that one could supposedly tell the twins apart by the small scar or dent.

The trial court charged the jury that the State had only to prove that Petitioner possessed the controlled substance Phenmetrazine with intent to sell or deliver it, and that the Defendant actually sold or delivered that controlled substance, in order for him to be found guilty of the two felony indictments with which he was charged. (State record, pp. 32-33; 36-38.) Specifically, the trial court charged, and the Petitioner excepted to, the following language concerning the essential elements of the two offenses:

> I charge that for you to find the Defendant guilty of selling or delivering Phenmetrazine, Preludin, a controlled substance, the State

must prove beyond a reasonable doubt that on the date in question, that is, January the 26th, 1979, that this Defendant, Clarence David McNeil, knowingly sold or delivered one tablet of Phenmetrazine to Officer J.L. Jordan.

DEFENDANT'S EXCEPTION NO. 11

I charge that for you to find the Defendant guilty of possessing Phenmetrazine or Preludin, a controlled substance, with the intent to sell or deliver it, the State must prove two things beyond a reasonable doubt. First, that on January the 26th, 1979, that this Defendant, Clarence David McNeil, knowingly possessed Phenmetrazine, a controlled substance. The Court instructs you that Phenmetrazine is a controlled substance included in Schedule Two of the North Carolina Controlled Substances Act. A person possesses a substance when he has, either by himself or together with others, both the power and intent to control the disposition or use of that substance. And, second, the State must prove beyond a reasonable doubt that at the time the Defendant possessed that tablet that he intended to sell or deliver that tablet.

DEFENDANT'S EXCEPTION NO. 12

(State record, pp. 32-33.)

At no time during the course of the jury instructions, did the trial court specify that Petitioner's alleged possession of the controlled substance with intent to sell or deliver it, or that Petitioner's alleged sale of the controlled substance, must be proven to be unlawful beyond a reasonable doubt before Petitioner could be convicted of either or both of the offenses.

REASONS FOR ALLOWING THE WRIT.

This case raises two Fourteenth Amendment Due Process issues of fundamental importance. The first issue raised is whether Petitioner was denied due process of law by being compelled to display himself to the jury while the State's witness pointed to alleged distinguishing characteristics upon Petitioner's person when there were no peculiar exigencies requiring it, when the State failed to demonstrate that no alternatives to such procedure existed, and where such a procedure before the jury was inherently suggestive. Secondly, this case raises the question of whether the trial court's failure to charge the jury that Petitioner must "unlawfully" have sold or delivered the alleged controlled substance, and that the Defendant must "unlawfully" have possessed same with intent to sell or deliver it, unconstitutionally and improperly alleviated the State of its burden of proving each element of the alleged offenses beyond a reasonable doubt.

Petitioner raised each of the above two federal constitutional issues in the courts below, by objecting and excepting to the rulings and charge of the trial court, and by expressingly raising and briefing the aforesaid two issues in both the North Carolina Court of Appeals and the North Carolina Supreme Court.

I. Petitioner's right not to be deprived of his liberty without due process of law was denied to him by the State Courts when he was compelled to display himself to the jury in an inherently suggestive fashion while the State's witness was permitted to point to alleged distinguishing characteristics upon Petitioner's person.

The State's key witness, Officer Jordan, upon whose testimoney and identification of the Petitioner the State's case entirely depended, testified that one descriptive characteristic in particular -- a small dent or scar over the left eye -- led him to conclude that the person from whom he allegedly obtained the single pill of Phenmetrazine was the Petitioner, and no one else, including Petitioner's identical twin brother Cepheus. (State record, p. 12.) While the direct examination

of Officer Jordan was in progress, the prosecutor requested the Court to instruct Petitioner to exhibit himself to the jury by standing close to it and in front of it. Over objection, Petitioner was compelled to do so. (State record, p. 13.) Over further objection, Officer Jordan was permitted to point to the scar over Petitioner's eye "in order to illustrate his prior testimony." (State record, p. 13.) This compelled identification procedure, over Petitioner's express objections, was unnecessary, inherently suggestive in nature, and was extremely prejudicial to Petitioner.

First of all, it should be pointed out that the State did not show, nor was it even suggested, that no alternative means existed whereby the scar or dent over Petitioner's eye could have been displayed to the jury. Close-up photographs are routinely taken of all criminal defendants upon their arrest, or could have been taken in the case at bar in any event; and the State did not and cannot demonstrate that a photo of Petitioner's face would not have been just as effective for purposes of "illustrating" the witness Jordan's testimony before the jury as a compelled exhibition of Petitioner's person.

Secondly, an alternative -- such as a photo -- would have been far less suggestive and a less prejudicial means of allowing the witness Jordan to "illustrate" his testimony concerning the scar than was the process by which Petitioner was compelled to move to the jury box, where the witness was then allowed to point to the alleged distinguishing characteristic on Petitioner's face. The literal pointing out of Petitioner as having the scar, and thus by implication of having committed the offenses charged, was highly suggestive in nature and need not have been resorted to at all.

Third, Petitioner emphasizes that he is not raising this claim in the context of a self-incrimination issue. Rather, Petitioner contends that in the context of a prejudicial and unnecessarily suggestive compelled display of his person to the jury in the manner as occurred on this

record, he was deprived of his due process rights under the Fourteenth Amendment.

Consequently, this case raises the issue of whether principles layed down in this Court's landmark decision in Stovall v. Denno, 388 U.S. 293 (1967), are applicable to the actual trial phase of the criminal process in this country, instead of being limited solely to pre-trial procedures. This is an issue which has never been addressed by this Court, but the record in this case discloses that it is a fundamental issue which this Court should decide.

Stovall v. Denno, and its progeny, are all cases which -- in one fashion or another -- raise the due process issue of eye-witness identification in the context of whether a pre-trial identification is admissible into evidence over due process objections, or whether an in-court identification which was influenced by an out-of-court identification procedure, is admissible over due process objections. Regardless of whether the identification being challenged is an out-of-court identification, or in-court identification following out-of-court identification, this Court in Manson v. Brathwaite, 432 U.S. 98 (1977), has made it clear that the ultimate outcome of the due process challenge must hinge on the trustworthiness or reliability of such identification. In order to reach an ultimate determination of whether the testimony (whether of in-court identification or out-of court identification) is sufficiently reliable to survive a due process challenge, the Court in Manson v. Brathwaite stressed five factors which must be balanced against the corrupting effect of the challenged identification itself.

Petitioner urges that the same factors required by the decisions of this Court to be weighed and balanced under the Stovall v. Denno line of cases should be extended to the situation presented by this case, where a criminal Defendant is identified for the first time in Court and is compelled to exhibit himself before the jury while the witness is identifying him to the jury or pointing out allegedly relevant physical characteristics.

In the case at bar, as the North Carolina Court of Appeals recognizes, the first identification of the Defendant was made by the witness while he was seated at counsel table, after the witness was permitted to approach him at counsel table -- and this was immediately followed up by the Defendant's being required to exhibit himself to the jury while the witness pointed out the allegedly crucial scar.

Applying Manson tests to the case at bar, it must be recognized that the identifying witness had an opportunity to view the Petitioner for only three to five minutes in the day time inside the premises where the pill was allegedly swapped for the meat. The witness did testify that he paid a high degree of attention to the person involved in the swap transaction because he was looking for a scar or dent near the left eye particularly. The witness, however, did not give any specific description of the person involved in the swap transaction to his fellow officer waiting on the outside of the premises, except to note to the fellow detective that the person from whom he obtained the pill did have a dent or scar. (State record, p. 14.) At trial, the only thing that told the witness that Petitioner was the person who gave him the Preludin pill was "the dent over his left eye. That tells me that this is the Defendant that I bought from on the 26th." (State record, p. 12.) The time between the alleged transaction and the trial at which the identification confrontation occurred was nearly four months. There is no evidence that the undercover witness saw photographs, a line-up, or anything else from which he previously identified Petitioner prior to the actual in-court confrontation and identification. Balanced against these factors must be remembered the fact that Petitoner had an identical twin brother, and that some other law enforcement officer who did not testify at the trial had informed the witness that the small scar or dent near the left eye was the way in which Petitioner could be told apart from his twin.

Petitioner concedes that his being required to stand

and exhibit himself to the jury does not violate the Fifth and Fourteenth Amendments' prohibition against compulsory self-incrimination. Holt v. United States, 218 U.S. 245 (1910). Petitioner also does not contend that what occured at his trial was so gross as to "shock the conscience" as occurred in Rochin v. California, 342 U.S. 165 (1952). However Petitioner does contend that where, as here, no exigent circumstances required it, alternatives were available, and the compulsion of the Defendant to exhibit himself before the jury so that the witness could point out a physical characteristic on his face was so inherently suggestive, the trial violated his rights to due process of law based upon the totality of the circumstances demonstrated on this record.

II. The trial court's failure to instruct the jury that Defendant's alleged sale or delivery of a controlled substance, and his alleged possession of same with intent to sell or deliver, must be found beyond a reasonable doubt to have been "unlawful" violated Petitioner's rights to due process of law by unconstitutionally and improperly alleviating the State of its burden to prove each element of offenses beyond a reasonable doubt.

Both of the indictments in Petitioner's two cases alleged that he unlawfully sold or delivered a controlled substance, and unlawfully possessed with intent to sell and deliver that same controlled substance. (State record, pp. 6-7.) Under North Carolina law, it is altogether possible for an individual to lawfully possess, to lawfully deliver, or to lawfully possess with the intent to deliver, a controlled substance as defined in the North Carolina Controlled Substances Act, N.C.G.S. §§90-86 et seq. (Replacement 1975). See, e.g. State v. Aiken, 286 N.C. 202, 209 S.E.2d 763 (1974); State v. Cameron, 283 N.C. 191, 195 S.E. 2d 481 (1973). Moreover, the statutory provision under which Petitioner was indicted and convicted, N.C.G.S. §90-95 (a), specifically admonishes that, "except as authorized by this Article, it is unlawful for any person" to sell or deliver or possess with intent to sell or deliver a controlled substance. (Replacement 1975) (Emphasis added). Several

sections of the Controlled Substances Act provide for a comprehensive system of registration or other factors which allow for lawful possession and/or delivery of controlled substances. See State v. Best, 292 N.C. 294, 233 S.E.2d 544 (1977); G.S. §§90-101 et seq. (Replacement 1975).

Given the above mandates, it is clear that delivery or possession with intent to deliver a controlled substance must be unlawful under the Controlled Substances Act in order to constitute a criminal offense in North Carolina -- in other words, unlawfulness is an essential element of the offense, just as the indictments in these two cases alleged.

It is fundamental that the State may not obtain a criminal conviction, consistently with due process, absent proof beyond a reasonable doubt of all elements -- not just some of them -- of the alleged offense. In Re Winship, 397 U.S. 358 (1970). In the case at bar, although unlawfulness was alleged in the indictments and would appear implicit with respect to any criminal offense, the trial court instructed the jury that the alleged offenses were complete upon proof that the Petitioner delivered or sold the alleged controlled substance or that he possessed same with intent to sell or deliver, without more. To the leaving out of an instruction on an essential element of the offense charged in each indictment, Petitioner duly excepted. (State record, pp. 32-33; 36-38.)

The Court of Appeals of North Carolina in its full opinion reasoned, however, that the North Carolina Controlled Substances Act -- and particularly N.C.G.S. §90-113.1 (a) -- creates a mandatory presumption of unlawfulness with respect to the sale, delivery, or possession with intent to sale or deliver a controlled substance; and that, therefore, the act requires a criminal defendant charged with a controlled substance violation to carry the burden of disproving this mandatory presumption. Such rationale, in order to avoid the In Re Winship problem, clearly violates the prior decisions of this Court decided under the Due

Process Clause.

First, the reasoning of the Court of Appeals of North Carolina, upheld by the Supreme Court of North Carolina, that N.C.G.S. §90-113.1 (a) creates a mandatory presumption and shifts the burden of proof to the Defendant to rebut it, violates the mandatory presumption rule set forth in this Court's recent decisions of Sandstrom v. Montana, 442 U.S. 510 (1979); County Court of Ulster County v. Allen, 442 U.S. 140 (1979). The principles of these cases are violated because a State may not benefit from a mandatory presumption in establishing criminality, since the North Carolina Statutory scheme as construed by the North Carolina Court of Appeals requires inference of unlawfulness from the mere fact of possession or delivery of a controlled substance.

Secondly, the construction of the North Carolina Statutory scheme given by the Court of Appeals of North Carolina's written opinion unconstitutionally shifts the burden of proof to the Defendant to prove lawfulness of his alleged conduct or actions in order to be acquitted of the charged offense. Mullaney v. Wilbur, 421 U.S. 684 (1975); In Re Winship, supra.

However viewed, the trial court's failure to charge the jury that a finding of unlawfulness was a prerequisite to convicting the Petitioner of the controlled substances offenses alleged -- when it must be acknowledged under North Carolina law that not all deliveries of controlled substances or possession of controlled substances with intent to deliver are unlawful in nature -- denied Petitioner those rights guaranteed to him under the Fourteenth Amendment to the Constitution of the United States not to be deprived of his liberty without due process of law.

CONCLUSION.

For the reasons set out above, Petitioner respectfully requests that this Court issue its Writ of Certiorari to review the written decision of the Court of Appeals of North

Carolina, and the Judgment of the Supreme Court of North Carolina upholding said Opinion.

Respectfully submitted,

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7910SC968

NORTH CAROLINA COURT OF APPEALS

Filed June 3, 1980

STATE OF NORTH CAROLINA

v.

Wake County
No. 79CRS7516
No. 79CRS7517

CLARENCE DAVID McNEIL

Appeal by defendant from Lee, Judge. Judgment entered 23 May 1979 in Superior Court, Wake County. Heard in the Court of Appeals 5 March 1980.

Defendant was charged and convicted under G.S. 90-95 (a) (1) and G.S. 90-95 (a) (3) for the felonious possession with the intent to sell and deliver and the felonious sale and delivery of phenmetrazine (preludin) a Schedule II controlled substance, and was sentenced to a prison term of not less nor more than two years.

At trial, the State presented evidence which tended to prove the following: On 26 January 1979 Raleigh Police Officer James L. Jordan was working as an undercover agent "making buys of drugs, intoxicating liquors and beverages at different locations." Jordan contacted defendant at approximately noon at 924 S. Blount Street in Raleigh, and negotiated the sale of one preludin pill in exchange for an amount of meat worth approximately $38. After the transaction Officer Jordan returned to his office and met a Detective Weathersbee, and the two officers secured the pill in an evidence envelope. The pill was later examined and found to be preludin. At trial, the pill was identified and admitted into evidence.

Defendant was identified by Officer Jordan during the trial as the person from whom he obtained the controlled

substance. The identification was based on Jordan's observation of defendant for approximately three to five minutes at a range of one foot in a well-lighted room.

Defendant presented no evidence.

From the judgment entered upon the jury verdict of guilty to the offenses charged, defendant appeals.

Attorney General Edmisten, by Assistant Attorney General Archie W. Anders, for the State.

Loflin, Loflin, Galloway and Acker, by Thomas F. Loflin, III, and James R. Acker, for defendant appellant.

MORRIS, Chief Judge. By his first assignment of error, defendant contends that the trial judge improperly referred to the bills of indictment returned against him while informing prospective jurors about the case, and that the trial judge erred by reading the bills of indictment to the jury during his jury charge.

With respect to the trial judge's opening remarks, defendant complains of the following portion:

> The defendant, Clarence David McNeil, is charged in one bill of indictment with the felony possession with intent to sell and deliver a controlled substance, to wit: Phenmetrazine, which is included in Schedule Two of the North Carolina Controlled Substance Act, and in another bill of indictment he is charged with the sale and delivery of that controlled substance. These offenses are alleged to have occurred on or about the 26th day of January, 1979, in Wake County. To all of the charges contained in those bills of indictment. . . .

Contrary to defendant's assertion, the trial judge's opening remarks did not violate G.S. 15A-1213 and G.S. 15A-1221. G.S. 15A-1221 prescribes the order of proceedings in a criminal jury trial, and provides, in pertinent part: "The

judge must inform the prospective jurors of the case in accordance with G.S. 15A-1213." G.S. 15A-1213 provides:

> Prior to selection of jurors, the judge must identify the parties and their counsel and briefly inform the prospective jurors, as to each defendant, of the charge, the date of the alleged offense, the name of any victim alleged in the pleading, the defendant's plea to the charge, and any affirmative defense of which the defendant has given pretrial notice as required by Article 52, Motions Practice. The judge may not read the pleadings to the jury.

We find in the Official Commentary published pursuant to these sections an explanation as to the purpose of the prohibition against reading criminal pleadings to the jury, "that jurors hearing the stilted language of indictments and other pleadings and witnessing various motions upon arraignment are likely to get a distorted view of the case." Although the trial judge referred to the indictments, he did not read them. Rather, the trial judge summarized those indictments and explained to the jury the circumstances under which defendant was being tried. This procedure is entirely appropriate and certainly complies with the spirit of G.S. 15A-1213.

With respect to the trial judge's reading the indictments returned against defendant during the charge to the jury, we find that this prohibition against reading the pleadings to the jury is inapplicable to the judge's jury charge. At that phase of the trial, "to infer that they [the jury] would be given a distorted view of the case by a mere reiteration of the charge couched in the words of the indictment would be illogical." State v. Laughinghouse, 39 N.C.App. 655, 658, 251 S.E.2d 667, 669, cert. denied and appeal dismissed, 297 N.C. 615, 257 S.E.2d 438 (1979). Defendant's first assignment of error is, therefore, overruled.

Defendant next argues that his right to due process of law was denied him when he was compelled to exhibit himself

to the jury for the purpose of allowing Officer Jordan to identify certain physical characteristics on defendant's person. Defendant argues that the State should have used some alternative means with which to display defendant's physical characteristics. Defendant argues further that even in those situations where exhibition of a defendant's person was held proper, some exigency justified such display. State v. Cook, 280 N.C. 642, 187 S.E. 2d 104 (1972); State v. Sanders, 280 N.C. 67, 185 S.E. 2d 137 (1971); State v. Thomas, 20 N.C. App. 255, 201 S.E. 2d 201 (1973), cert. denied, 284 N.C. 622, 202 S.E. 2d 277 (1974). We disagree.

Although defendant's assignment of error is based on due process considerations and not on defendant's Fifth Amendment right to be free from self-incrimination, we note that application of the position of the Court in cases decided under the Fifth Amendment would require the conclusion that requiring defendant to stand before the jury did not violate his constitutional protection against self-incrimination. The privilege against self-incrimination protects an accused only from being compelled to testify against himself or provide the State with evidence which is testimonial or communicative in nature. Schmerber v. California, 384 U.S. 757, 16 L.Ed. 2d 908, 86 S.Ct. 1826 (1966); Holt v. United States, 218 U.S. 245, 54 L.Ed. 2d 141 (1976). It is, therefore, proper for the State to require a defendant to stand or otherwise exhibit himself before the jury where such an act is not of a testimonial or communicative nature. See State v. Perry, supra, and cases there cited.

With respect to defendant's claim that he was deprived of his liberty without due process of law, defendant contends that the totality of the circumstances prevalent at trial made this identification procedure improperly suggestive and prejudicial. The identification of defendant by Officer Jordan, however, had occurred prior to defendant's having to stand before the jury. The record indicates that when asked if he could identify defendant, the witness requested and was allowed to leave the

witness stand, walk over to the defense table, and observe defendant. Upon returning to the witness stand, Officer Jordan stated: "When I looked at the defendant sitting at the table I looked at the dent [scar] over his left eye. That tells me that this is the defendant that I bought from on the 26th." It was only after this identification that Officer Jordan was permitted to illustrate his testimony by pointing out the scar over defendant's left eye.

In State v. Perry, supra, defendant was required to stand before the jury and place a stocking mask over his head and face in the way a State's witness had testified it was worn by the man who robbed and assaulted her. The Court cited Schmerber v. California in holding that such a procedure did not offend the "sense of justice" implicit in the due process clause of the Fourteenth Amendment to the Constitution of the United States and Article 1, §19 of the Constitution of North Carolina. See also Rochin v. California, 342 U.S. 165, 96 L.Ed. 183, 72 S.Ct. 205 (1952). In the present case, we do not believe the exhibition of certain characteristics of one's person offends the "sense of justice" so as to warrant defendant a new trial. We believe that such a procedure is a logical extension of the rule that witnesses may testify as to a defendant's physical condition or as to identifying marks on his body. See State v. Floyd, 246 N.C. 434, 98 S.E.2d 478 (1957). This assignment of error is overruled.

By his fourth assignment of error defendant contends that the trial court erred in allowing testimony as to whether an "unusual" amount of traffic had been observed around defendant's home during the two months immediately preceding the alleged illegal transaction. Defendant contends that the question asked by the prosecutor was leading, that it elicited a conclusory opinion from the witness, and that the admission of such testimony was prejudicial to him.

Although the question was leading in nature, the

control of examination of witnesses is a matter of discretion vested in the trial court, reviewable only for an abuse of discretion. State v. Painter, 265 N.C. 277, 144 S.E.2d 6 (1965). We find no abuse of discretion here.

Nor did the testimony concerning the amount of traffic around defendant's house constitute the expression of an improper opinion. An opinion can be best explained as "any narrative statement by a witness which does not describe facts directly perceived by the senses in the fullest detail that could reasonably be expected of an average witness and reasonably be understood by an average juror." 1 Stansbury's N.C. Evidence §122 (Brandis rev. 1973). An opinion is inadmissible whenever the witness can relate facts so that the trier of fact will have an understanding of them and the jury is as well qualified as the witness to draw inferences and conclusions from those facts. State v. Patterson, 288 N.C. 553, 220 S.E.2d 600 (1975), death sentence vacated, 428 U.S. 904, 49 L.Fd.2d 1211, 96 S.Ct. 3211 (1976). The response by the witness was as follows:

> Yes, sir. We had seen cars come and go, and they would come and go in just for a short while and leave.

Such a response is properly admissible as evidence of an observer testifying to the results of his observation. See State v. Sasser, 21 N.C. App. 618, 205 S.E.2d 565, cert. denied, 285 N.C. 667, 207 S.E.2d 764 (1974). In any event, even if the admission of this evidence was error, we find no prejudice which would justify awarding defendant a new trial. This assignment of error is overruled.

By his fifth assignment of error, defendant contends that the trial judge erroneously failed to instruct the jury that defendant's alleged possession of a controlled

substance with intent to sell and deliver, and defendant's alleged sale and delivery of a controlled substance must have been "unlawful" in order to convict him of those offenses. The validity of the court's instruction depends on an analysis of certain provisions of the North Carolina Controlled Substances Act, Article 5, Chapter 90 of the North Carolina General Statutes.

The portion of the trial judge's charge to the jury to which defendant excepts is as follows:

> I charge that for you to find the defendant guilty of selling or delivering Phenmetrazine, Preludin, a controlled substance, the State must prove beyond a reasonable doubt that on the date in question, that is, January the 26th, 1979, that this defendant, Clarence David McNeil, knowingly sold or delivered one tablet of Phenmetrazine to Officer J.L. Jordan.
>
> I charge that for you to find the defendant guilty of possessing Phenmetrazine or Preludin, a controlled substance, with the intent to sell or deliver it, the State must prove two things beyond a reasonable doubt. First, that on January the 26th, 1979, that this defendant, Clarence David McNeil, knowingly possessed Phenmetrazine, a controlled substance . . . . A person possesses a substance when he has, either by himself or together with others, both the power and intent to control the disposition or use of that substance. And, second, the State must prove beyond a reasonable doubt that at the time defendant possessed that tablet that he intended to sell or deliver that tablet.

The challenged instructions closely parallel North Carolina Pattern Instructions Nos. 260.21 and 260.15. Nowhere in the charge does the term "unlawfully" appear. Defendant insists that such an omission creates a presumption of unlawfulness from the mere possession or sale and delivery of the controlled substance, thereby shifting the burden of proof to defen-

dant.

G.S. 90-95, upon which defendant's conviction is based, provides, in pertinent part, as follows:

> (a) Except as authorized by this Article, it is unlawful for any person:
>
> (1) To manufacture, sell or deliver, or possess with intent to manufacture, sell or deliver, a controlled substance;
>
> (3) To possess a controlled substance.

It is clear that one may be exempt from State prosecution for the possession or the sale or delivery of controlled substances if that person is authorized by the North Carolina Controlled Substances Act to so possess or sell or deliver such substances. See e.g., G.S. 90-95(a); G.S. 90-113.3(f); State v. Cameron, 283 N.C. 191, 195 S.E. 2d 481 (1973). However, the legislative scheme implicit in the North Carolina Controlled Substances Act provides that, in a proseuction under G.S. 90-95, proof of such exemption through authorization must be provided by the defendant. G.S. 90-113.1(a) provides:

> It shall not be necessary for the State to negate any exemption or exception set forth in this Article in any complaint, information, indictment, or other pleading or in any trial, hearing, or other proceeding under this Article, and the burden of proof of any such exemption or exception shall be upon the person claiming its benefit.

It is defendant's position that this section is unconstitutional in that it creates a mandatory presumption of criminality and shifts the burden of proof to defendant to prove lawfulness in order to be acquitted of the crimes charged under G.S. 90-95.

We do not believe this statutory scheme runs afoul of

constitutional standards. G.S. 90-95 makes criminal the manufacture, possession, sale or delivery of a controlled substance. Phenmetrazine is listed as a Schedule II controlled substance. G.S. 90-90(c) (2). The manufacture, possession, sale or delivery of phenmetrazine is unlawful unless and until it is authorized under an appropriate section of the Act. G.S. 90-95. It is only under those circumstances that one may avoid prosecution if he otherwise falls under the provisions of the Act.

In two recent decisions, this Court dealt with the exemption provisions of G.S. 90-113.1. State v. Best, 31 N.C. App. 250, 229 S.E. 2d 581 (1976), reversed on other grounds, 292 N.C. 294, 233 S.E. 2d 544 (1977); State v. Richardson, 23 N.C. App. 33, 208 S.E. 2d 274, cert. denied and appeal dismissed, 286 N.C. 213, 209 S.E. 2d 317 (1974). In State v. Best, supra, this Court dealt with the matter of exemption for physicians in writing prescriptions for controlled substances during the course of their professional practice. In that case we observed that it was the duty of the defendant to "bring himself within an exception to the foregoing prohibition. G.S. 90-113.1." 31 N.C. App. at 264, 229 S.E. 2d at 589. Similarly, in State v. Richardson, supra, defendant appealed from a judgment denying him remission of an automobile confiscated by court order pursuant to G.S. 90-112(f), which provides for the forfeiture of all conveyances used to transport controlled substances. The Court explained the statutory scheme dealing with forfeitures under Chapter 90 by applying G.S. 90-113.1 (a):

> North Carolina law subjects a vehicle which is found to have been used in the illegal transportation of narcotic drugs to immediate forfeiture. Forfeiture may be defeated if the claimant can show the illegal use occurred without his knowledge or consent, with the claimant having the right to have a jury pass upon his claim . . . The burden is statutorily placed upon the claimant to show the absence of consent or knowledge. G.S. 18A-21(b); G.S.

90-113.1(a).

23 N.C. App. at 36, 208 S.E. 2d at 276. Although the precise question of this appeal was not before the Court in Best and Richardson, we agree with these decisions insofar as they approve of the procedure adopted by G.S. 90-113.1 to establish an exemption status in proseuctions under Chapter 90. Contrary to defendant's contentions, this section does not shift the burden of proof away from the State. G.S. 90-95 makes clear the requirements for finding defendant guilty of the manufacture, possession, sale or delivery of a controlled substance. That burden remains with the State.

Since the statutory scheme implicit in the Controlled Substances Act establishes criminal liability once defendant commits the acts set forth in G.S. 90-95, it is apparent that the trial judge properly instructed the jury as to what it must find in order to find defendant guilty. Where the judge's charge fully instructs the jury on all the substantive areas of the case, and defines and applies the law thereto, it is sufficient. G.S. 15A-1231, -1232; State v. Garret, 5 N.C. App. 367, 168 S.E. 2d 479 (1969).

We find that defendant received a fair trial free from prejudicial error.

No error.

Judges VAUGHN and ARNOLD concur.

Appendix B

No. 307PC

TENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

Spring Term 1980

****

STATE OF NORTH CAROLINA	)	
	)	JUDGMENT DISMISSING APPEAL
v.	)	ON MOTION OF ATTORNEY
	)	GENERAL AND DENYING PETI-
CLARENCE DAVID McNEIL	)	TION FOR DISCRETIONARY
		REVIEW

****

This matter came on to be considered upon defendant's notice of appeal from the North Carolina Court of Appeals, pursuant to G.S. 7A-30, upon the Attorney General's motion to dismiss the appeal for lack of a substantial constitutional question, and upon defendant's petition for discretionary review of the decision of the North Carolina Court of Appeals, pursuant to G.S. 7A-31; upon consideration whereof, it is adjudged by the Court in conference this 16th day of September, 1980 that the motion to dismiss the appeal be allowed, that the petition for discretionary review be denied, and tht it be so certified to the North Carolina Court of Appeals.

It is considered and adjudged further that the defendant do pay the sum of NINE AND NO/100 DOLLARS ($9.00) and execution issue therefor.

s/ Carlton, J.
For the Court

The foregoing order is issued over my hand and the seal of the Supreme Court this 24 day of September, 1980.

s/ John R. Morgan
John R. Morgan
Clerk of the Supreme Court
of North Carolina

CERTIFICATE OF SERVICE

The undersigned counsel of record for the Petitioner herein, Clarence David McNeil, hereby certifies that three copies of the foregoing Petition for Writ of Certiorari were served upon counsel of record for the Respondent on the date indicated below by depositing same in the United States mails, first class postage pre-paid, properly addressed to said counsel for the Respondent at his last-known post office address as follows:

Archie W. Anders, Esquire
Assistant Attorney General
North Carolina Department of Justice
Post Office Box 25201
Raleigh, North Carolina 27611

It is further certified that all parties required to be served have been served on the date indicated below.

This the 21st day of November, 1980.

THOMAS F. LOFLIN III
Counsel of Record for Petitioner

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